

ES&S AutoMARK Hearing, October 15, 2007  
Public Comment from David Cary  
Submitted October 19, 2007

Election accuracy is a critical component of effective elections. Public confidence that votes are cast and tabulated accurately is fundamental to the success of the California Republic. To the extent that California uses machines to help cast, validate, and tabulate votes, it is essential that those machines be subject to careful scrutiny before and after elections.

HAVA encourages the expectation that federal certification alone may not be sufficient scrutiny. California state law establishes that federal certification is not sufficient scrutiny and that prior notification for any change is required.

When an election machine vendor tries to excuse its violations of state law by claiming its behavior was consistent with historical practice, it is all the more important to clearly demonstrate that state law was implemented precisely to change historical practice. For those who are unwilling to follow the law, it is appropriate to translate that message into a form that they will understand and that will protect California elections

At the October 15<sup>th</sup> hearing, John Groh asserted that the versions of firmware are the same for the two versions of the AutoMARK. The firmware versions for the A100 have been identified both as 1.0 and as 1.0.168, and for the A200 as 1.1.2258. The ES&S written comment says that a 1.0 version of firmware was initially shipped to California with the A200. The ES&S written comment leaves open, perhaps even implies, the possibility that the firmware delivered or used with the A200 was different from the firmware previously examined and authorized for the A100, despite being designated with a common two-part version number. Comments from ES&S suggest a standard of sameness for firmware that may only encompass some sense of same functionality. While ES&S claims that the version 1.0 firmware that runs on the E200 is backward compatible with the A100, this was not verified and was not within the scope of the ITA's federal examination.

As part of the ongoing investigation, it is important to establish what, if any, differences there are and were in the actual content between various instances of firmware. In determining whether changes had been made, it is important to not simply rely on version numbers, which may not reflect "minor" changes or patches. If the State of California is unable to definitively establish the specific content of firmware that was actually delivered or used in elections for either the A100 or A200, independently of any investigated parties, Secretary Bowen should consider whether additional legislative solutions are needed for the future. In any case, these incidents highlight the need for and value of conducting independent pre- and post-election audits that go beyond manual tallies of ballots.

The continuing investigation should look beyond just the question of whether ES&S violated state law. For example, the extent to which unauthorized machines were deployed, used, or malfunctioned in elections should be established. The investigation should establish the extent to which county election officials were misled by ES&S or instead contributed to the acquisition and deployment of unauthorized machines. Such facts can help determine the appropriate level of any penalties for ES&S. Also, the people of California should be given a full accounting of what happened so that they are able to make their own evaluations and act as fully informed voters.

Independent review, especially when done openly, is a powerful tool for quality assurance, helping to avoid preventable and costly mistakes. Review is a useful tool not only for voting systems, but also for voting system regulation and election regulation in general. I support Secretary Bowen's endorsement of the principle that her regulatory processes use public input and review to supplement what is required by law. I encourage her to continue and expand her best-practices of this principle. Public review can help assure that regulatory responses from this investigation do not inadvertently have an adverse impact, directly or indirectly, on the effectiveness of California elections.

The effectiveness of elections depends on many factors, including election accuracy, voter accessibility, voter participation, availability of a spectrum of competitive and representative candidates, and election methods that produce better results, such as IRV, choice voting, and other approaches to proportional representation. Success with one of these factors is magnified by successes in other areas. By itself, no limited subset of factors can provide effective elections. It is important that California work to concurrently support a variety of improvements and to coordinate the various efforts.

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